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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

GAYLORD CONTAINER CORP., GEORGIA-PACIFIC CORP., INTERNATIONAL PAPER CO., JEFFERSON SMURFIT CORP., PACKAGING CORPORATION OF AMERICA, INC., SMURFIT-STONE CONTAINER CORP., STONE CONTAINER CORP., TEMPLE-INLAND, INC., TENNECO, INC., TENNECO PACKAGING, INC., UNION CAMP CORP., AND WEYERHAEUSER CO.,

Petitioners,

v.

GARRETT PAPER, INC., GENERAL REFRACTORIES CO., ALBERT I. HALPER CORRUGATED BOX CO., LOCAL BAKING PRODUCTS, INC., AND OAK VALLEY FARMS, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY TO BRIEF IN OPPOSITION

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I. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That The Fact Of Individual Injury In Antitrust Cases Can Be Established On A Classwide Basis.

Respondents first argue that the question whether fact of injury can be established on a classwide basis in antitrust cases is "factbound," Opp. 9, and that the decision below thus raises no legal issue of any importance. That argument is unavailing.

Respondents begin by asserting that the Fourth Circuit's landmark decision in *Windham v. American Brands, Inc.*, 565 F.2d 59 (1977) (*en banc*), did not adopt any bright-line rule that the fact of injury is invariably an individual question. *See* Opp. 10-12. That assertion, however, contradicts *Windham*'s categorical holding that "[w]hile [an antitrust] case may present a common question of violation, the issues of injury and damage remain the critical issues in such a case and are *always* strictly individualized." 565 F.2d at 66 (emphasis added). Contrary to respondents' suggestion, this was not dicta, but holding: the Fourth Circuit held that class certification was improper in *Windham* precisely because the fact of injury is an essential element of liability that requires an individualized inquiry. *See id.* at 66-72. The fact that the Fourth Circuit reviewed the district court's decision not to certify a class under a deferential standard of review, *see* Opp. 10, or that the court ultimately also held that the district court correctly rejected the use of a "fluid recovery" theory of *damages*, *see* Opp. 10-11 n.14, in no way detracts from that core holding.[1]

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[1] Contrary to respondents' repeated assertions, *see, e.g.*, Opp. 9, petitioners do not contend that *Windham* established a *per se* rule against class certification in antitrust cases. Instead, *Windham* merely held that the fact of injury must be treated as an individualized issue, whether in applying the predominance requirement of Rule 23(b)(3) or any of the other requirements of Rule 23. On that critical issue, *Windham* expressly rejected the Third Circuit's contrary holding in *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (3d Cir. 1977), on which the Third Circuit relied below, *see* Pet. App. 10a-13a, 18a, and instead endorsed the dissent in *Bogosian*, *see* 565 F.2d at 71 n.36.

In a similar vein, respondents assert that *Windham* is distinguishable because the plaintiffs there alleged "extraordinarily complex conspiracies . . . that involved different actions and different consequences at different auctions, on different days, and in different weeks." Opp. 12 n.16. That assertion, however, is disingenuous, because at least some of the *Windham* plaintiffs alleged that defendants *directly fixed* the price of the product plaintiffs had purchased. *See* 565 F.2d at 64, 67. Thus, if anything, the claims at issue here present a *more* compelling context for holding that the fact of injury requires an individualized inquiry than *Windham*, because the tens of thousands of putative class members here concededly purchased *different products* (corrugated boxes and sheets) from the one as to which a reduction in output was alleged (linerboard) in millions of individual transactions across the Nation for more than two years, and their claims thus present an array of complex causation questions that do not arise in direct price-fixing cases.[2] Put in the language of *Windham*, this is the sort of case in which the fact of injury "does not lend itself to . . . a mechanical calculation," and thus class certification is manifestly inappropriate. *Id.* at 68.

Respondents finally assert that the Fourth Circuit could not have meant what it said in *Windham* because it has had "ample opportunity" to reaffirm *Windham* but has failed to do so. Opp. 11 n.15. Far from backing away from *Windham*, however, the Fourth Circuit recently cited it approvingly for the proposition

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[2] For this reason, respondents' insistence that they are "*direct* purchasers of corrugated boxes and sheets," Opp. 1 (emphasis added), is misleading. While respondents and their putative class members did indeed "directly" purchase corrugated boxes and sheets from petitioners, they did *not* directly purchase linerboard, the product as to which a reduction in output is alleged. Whether an alleged conspiracy to restrict the output of *linerboard* raised the price of *corrugated boxes and sheets* presents complex causation questions that simply cannot be answered on a classwide basis: an increase in the price of linerboard may or may not be reflected in an increase in the price of corrugated boxes and sheets for a variety of individualized reasons.

that the need for individualized proof of injury "may defeat predominance" where (as in the antitrust context) such proof is "essential to liability." *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 147 (2001); *accord Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998) ("In *Windham* we held proof of damages was 'always strictly individualized,' and we invalidated '[g]eneralized or class-wide proof of damages' because proof of actual, individual damages was a critical element of a plaintiff's antitrust claim."). Although respondents correctly note that several district courts in the Fourth Circuit have certified classes in antitrust cases, *see* Opp. 11-12, none of those decisions questions *Windham*, and, for that matter, none of those decisions has been reviewed on the merits by the Fourth Circuit.

Respondents' efforts to distinguish cases from the Fifth and Ninth Circuits are similarly unavailing. In *Shumate & Co. v. National Ass'n of Securities Dealers, Inc.*, 509 F.2d 147 (1975), the Fifth Circuit upheld the denial of class certification on the ground that, in antitrust cases, "the proof of injury to business or property of each class member is critical for the determination of defendants' liability to any individual." *Id.* at 155. The court expressly distinguished cases in which "liability can be shown as to all class members, with only the amount of damage to be determined as to each." *Id.* Contrary to respondents' insinuation, *see* Opp. 16 n.19, nothing in *Shumate* suggests that the latter category includes antitrust cases.

To be sure, as noted in the petition, *see* Pet. 13 n.2, the Fifth Circuit did suggest in *Alabama v. Blue Bird Body Co.*, 573 F.2d 309 (1978), that there might be some antitrust cases in which the fact of injury might not require an individualized inquiry, *see id.* at 327 & n.34. As the Fifth Circuit made clear, however, these would be cases alleging "an unlawful overcharge with respect to a homogeneous or fungible product which was marketed in a similar manner throughout the country," such that "'impact' and 'buyer' become almost synonymous, and, therefore, once the illegal overcharge as to

the homogeneous products has been established, it is most reasonable to assume 'injury' or 'impact' upon a showing of proof of purchase." *Id.* at 324. This is unquestionably not such a case: as noted above, this case involves allegations that the defendants conspired to reduce supply of a product (linerboard) *other* than the product the plaintiffs purchased (corrugated boxes and sheets).[3] In such a case, injury to every purchaser is not guaranteed, because the price any given purchaser paid for corrugated boxes and sheets may or may not have been affected by the price of linerboard, so that mere "proof of purchase" would not establish injury. *Id.* at 327 n.34.[4] It is simply impossible to determine, absent individualized mini-trials, what factors affected the price of corrugated boxes and sheets purchased by respondents and their tens of thousands of putative class members across the Nation for more than two years.

Finally, the decision below also conflicts with the Ninth Circuit's decision in *In re Hotel Telephone Charges*, 500 F.2d 86 (1974). There, the Ninth Circuit rejected class certification in a case involving allegations of a nationwide conspiracy among hotel chains to increase room telephone charges. *See id.* at 88. The court reasoned that the fact of injury would require individualized inquiry because each class member would have to prove that he patronized a hotel "while the surcharge was in

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[3] Similarly, all of the district court cases from the Fifth or Eleventh Circuit cited by respondents appear to involve allegations that the defendants either fixed the price or reduced the output of the product that the plaintiffs had purchased. *See* Opp. 14-16.

[4] Respondents additionally cite *In re Plywood Antitrust Litig.*, 655 F.2d 627 (5th Cir. 1981), and *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019 (5th Cir. 1983), as cases in which the Fifth Circuit has "affirmed a classwide verdict in an antitrust class action." Opp. 14. In *Plywood*, however, the defendants did not challenge class certification at all on appeal, and in *Greenhaw*, the defendants challenged class certification only on the ground that the litigation was brought solely for the purpose of obtaining large attorneys' fees. *See* 721 F.2d at 1024.

effect and that he absorbed the cost of the surcharge." *Id.* at 89. To be sure, as respondents point out, *see* Opp. 17, the Ninth Circuit also noted that variations in evidence with respect to the *defendants* precluded class certification. Those variations, however, like the variations in evidence with respect to the *plaintiffs*, related directly to whether any given plaintiff could establish the fact of injury: if a particular defendant could come forward with evidence that the cost of a telephone service charge would have been the same in a competitive market, for example, that evidence would indicate that the relevant plaintiffs had suffered no cognizable injury. *See Hotel*, 500 F.2d at 89. The Ninth Circuit plainly and unconditionally concluded that the fact of injury constituted an "individual question[]" which, in conjunction with other individual questions, precluded class certification. *Id.*[5]

By allowing respondents to proceed with a class action merely by presenting "experts" who assert that the fact of injury can be established on a classwide basis—without, as respondents have recognized, so much as proffering the economic models themselves that would ostensibly be used to do so, *see* Opp. 6—the Third Circuit has deepened a circuit conflict as to whether the fact of injury should be treated as an individual or common issue. The decision below threatens to eviscerate the requirements of Rule 23: if plaintiffs can render an inherently individualized issue "common" simply by introducing an expert report stating that the issue can be proved on a classwide basis, hardly any class will fail the requirements of Rule 23, and the Rule will cease to serve any meaningful gatekeeping function. The Court's review is warranted on this issue of great legal and practical significance.

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[5] The other Ninth Circuit case on which respondents rely, *Blackie v. Barrack*, 524 F.2d 891 (1975), is readily distinguishable. That case was a securities class action, not an antitrust one, and in that discrete context, the Ninth Circuit, like other courts, concluded that causation could essentially be *presumed* on a classwide basis upon a showing of the materiality of the misrepresentations at issue. *See id.* at 906.

II. The Third Circuit Erred, And Deepened A Circuit Conflict, By Holding That Fraudulent Concealment Can Be Established On A Classwide Basis.

Respondents next argue that (1) the "fraudulent concealment issue is not presented in this case," and (2) the Third Circuit's "holding on fraudulent concealment does not create any circuit split." Opp. 19 (capitalization modified). These arguments are not only inconsistent but incorrect.

A. The Fraudulent Concealment Issue Is Squarely Presented Here.

Respondents lead with the implausible argument that the "fraudulent concealment issue is not presented in this case," Opp. 19, even though the Third Circuit squarely addressed that issue, Pet. App. 26a-34a. The gist of respondents' argument appears to be that the fraudulent concealment issue is "not presented" here because it applies to only *some* (but concededly not *all*) of the claims that the Third Circuit allowed respondents to pursue on a classwide basis. That argument makes no sense.

The question presented to the Third Circuit (and now to this Court) is whether the district court erred in certifying classes to pursue claims that concededly would be time-barred but for respondents' reliance on the doctrine of fraudulent concealment. The Third Circuit answered that question in the negative, and allowed respondents to pursue such claims on a classwide basis. Whether respondents can also pursue *other* claims on a classwide basis is wholly irrelevant to that question. Respondents thus err by asserting that "a determination in Petitioners' favor on the issue they raise would not result here in the reversal of class certification," Opp. 19: if petitioners were to prevail on this issue, the Third Circuit's decision would have to be reversed, because the Third Circuit allowed respondents to pursue claims that require them to prove fraudulent concealment on behalf of tens of thousands of absent class members for almost a third of the class period. *Compare* Pet. App. 5a-6a (affirming certification of classes

consisting of persons who purchased corrugated boxes and sheets from petitioners from "October 1, 1993 through November 30, 1995") *with* Opp. 20-21 & nn. 22, 23 (conceding that respondents rely solely on fraudulent concealment to justify all claims prior to May 1994). Contrary to respondents' assertion, this is not a question of "the amount of *damages*" to which each class member might be entitled, Opp. 26 (emphasis added), but a question of petitioners' *liability* to each class member for claims that concededly would be time-barred but for respondents' invocation of fraudulent concealment.

Respondents try to downplay this point by suggesting that the district court itself could always undertake "a modification of the class definition to exclude the earliest purchases." Opp. 20. This suggestion is, to say the least, disingenuous. The Third Circuit *affirmed* the district court's decision to allow respondents to pursue classwide claims based on the earliest purchases; respondents do not suggest any reason why the district court would now turn around and exclude those very claims. If the mere truism that class certification orders always remain open to modification, *see* Fed. R. Civ. P. 23(c)(1), were enough to preclude interlocutory appellate review of certification orders, then Rule 23(f)—which was adopted in 1998 expressly to authorize such review—would be a nullity. Rule 23(f) gives the courts of appeals "a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues," a power "akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Rule 23(f) Advisory Committee Note. The Third Circuit recognized that the class certification issues presented here are sufficiently important and far-reaching to warrant Rule 23(f) review, and that court's resolution of those issues in turn is plainly ripe and appropriate for this Court's review.

B. The Decision Below Concededly Deepened A Circuit Split on The Fraudulent Concealment Issue.

Respondents finally argue that "there is no circuit split on the question whether the presence of individualized issues

relating to fraudulent concealment precludes a finding that common issues predominate." Opp. 22 (capitalization modified). That argument would come as a surprise to the Third Circuit itself, which acknowledged a conflict between the First and Fourth Circuits on this point, and expressly aligned itself with the First Circuit. *See* Pet. App. 31a-32a (citing *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), and *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998)). As the Third Circuit explained, *Waste Management* "reject[ed] the rationale in *Broussard*," and held that a plaintiff's reliance on fraudulent concealment presented no bar to class certification. Pet. App. 31a. And the Third Circuit left no doubt about where it came down on this split: "We accept this reasoning [of the First Circuit in *Waste Management*] as more persuasive than that espoused by the Court of Appeals for the Fourth Circuit in *Broussard*." *Id.* at 32a.

Respondents try to deny this circuit split by insisting that *Broussard* was a "highly unusual" case that "did not adopt any *per se* rule prohibiting class certification in the presence of individualized issues concerning the statute of limitations or its tolling." Opp. 23. Respondents are wrong. The Fourth Circuit in *Broussard* specifically held that fraudulent concealment could not established on a classwide basis because it "depends on individualized showings that are non-typical and unique to each [plaintiff]." 155 F.3d at 342. That point, in and of itself, "precluded class certification" in *Broussard*, *id.*, although the Court also held that certification was inappropriate on a variety of other grounds. Respondents thus ultimately fall back on trying to distinguish *Broussard* in a number of ways, all of which are unavailing.

First, respondents assert that *Broussard* "did not even address fraudulent concealment." Opp. 25. But this is just a play on words. The *Broussard* plaintiffs used the label "equitable tolling" rather than "fraudulent concealment" to justify their attempt to pursue otherwise time-barred claims.

Regardless of the label, the plaintiffs in *Broussard* made the same argument as respondents here: that they should be allowed to pursue otherwise time-barred claims because their delay in suing was caused by the defendants' alleged material omissions and/or misrepresentations. *See* 155 F.3d at 342.

Second, respondents argue that *Broussard* "made clear that it was establishing no '*per se* rule,'" because that decision (1) stated that Rule 23 does not "'require that members of the class have *identical factual and legal claims in all respects*,'" and (2) "even left open the possibility of class certification on remand." Opp. 24 (quoting 155 F.3d at 344; emphasis added). These are both *non sequiturs*. There is no legal or logical inconsistency between a rule that the inherently individualized doctrine of fraudulent concealment must be individually litigated and the truism that the claims of class members need not be "identical . . . in all respects" to warrant certification. And by leaving open the possibility of certification of a more limited class on remand, the Fourth Circuit did not remotely suggest that such a class could pursue claims that would be time-barred but for the doctrine of fraudulent concealment.

Third, respondents suggest that *Broussard* must be read in light of "Fourth Circuit caselaw under which class certifications have been upheld despite the presence of individual issues." Opp. 23 (citing *Central Wesleyan College v. W.R. Grace & Co.*, 6 F.3d 177, 189 (4th Cir. 1993)). That suggestion, however, is based on an outright distortion of *Central Wesleyan*, which was authored by none other than Judge Wilkinson, the author of *Broussard*. Although respondents assert that the Fourth Circuit in *Central Wesleyan* "affirmed certification of a class where it recognized that an individual limitations issue was present," Opp. 22, they rely on a section of *Central Wesleyan* that addressed potential *problems* with certification that might eventually require decertification or modification of the class, *see* 6 F.3d at 188-89. *Central Wesleyan*'s recognition that "[d]ifferent time bar defenses," *id.* at 189—if raised at some future point—might undermine certification is entirely

consistent with *Broussard*. Certainly, *Central Wesleyan* provides no support for the Third Circuit's holding that respondents are entitled to represent classes in pursuing claims that would be time-barred but for the doctrine of fraudulent concealment.

Finally, respondents note that "*Broussard* was not even a Rule 23(b)(3) case," because the Fourth Circuit held "that the putative class there could not be certified because of failure to meet the typicality and commonality requirements of Rule 23(a)." Opp. 28. It is not clear what respondents hope to achieve with this argument, since the requirements of Rule 23(a) are "subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class 'predominate over' other questions," *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 609 (1997), so that failure to meet the threshold commonality and typicality requirements of Rule 23(a) *a fortiori* means failure to meet the predominance and superiority requirements of Rule 23(b)(3), *see id.* at 623-24 ("Even if Rule 23(a)'s commonality requirement may be satisfied by [a] shared experience, the predominance criterion is far more demanding."); *cf. Lienhart*, 255 F.3d at 147 ("In *Broussard*, we addressed the predominance, commonality and typicality difficulties that arise under Rule 23 when a myriad of plaintiffs attempt to consolidate legally and factually different claims via the class action device."). Whether analyzed under Rule 23(a) or Rule 23(b)(3), the point remains that the circuits are divided on whether plaintiffs can represent classes in pursuing claims that require them to establish fraudulent concealment, and this Court's review is warranted on that important and recurring issue. *See* Pet. 20-21.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition for *certiorari*, this Court should grant the petition.

Respectfully submitted,

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